

# PROPOSING A TREATY ON THE PREVENTION OF INTERNATIONAL CORRUPT PAYMENTS: CLONING THE FOREIGN CORRUPT PRACTICES ACT IS NOT THE ANSWER

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I.	INTRODUCTION .....	3
II.	ANALYZING PAST INTERNATIONAL ATTEMPTS TO COMBAT CORRUPT PAYMENTS TO FOREIGN OFFICIALS .....	4
III.	THE NEED FOR A MULTINATIONAL TREATY TO COMBAT INTERNATIONAL FOREIGN CORRUPT PAYMENTS.....	16
V.	STRATEGIES TO SECURE SIGNATORIES .....	27
VI.	CONCLUSION .....	29
VII.	PROPOSED TREATY ON THE PREVENTION OF INTERNATIONAL CORRUPT PAYMENTS.....	31

## I. INTRODUCTION

The taking of a bribe or gratuity, should be punished with as severe penalties as the defrauding of the State.

- William Penn<sup>1</sup>

If all statesmen shared this ideology, there would be no need for this article. However, a glance at current business journals and news agencies shows the great necessity to address global corrupt practices in today's transnational business environment.<sup>2</sup> No matter what label you

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1. WILLIAM PENN, SOME FRUITS OF SOLITUDE, IN REFLECTIONS AND MAXIMS 76 (Intro. by Edmond Goss, Folcroft Library ed. 1976).

2. See Chris Blackhurst, *Civil Servant Who Enjoyed Life of Luxury on Proceeds of Corruption*, INDEPENDENT (London), May 27, 1994, at 2 (3d ed.) (stating British official took "backhanders from foreign firms in return for dishing out tens of millions of pounds in orders"); Svenska Dagbladet, *Kockums Smutskastas*, SKAANSKA DAGBLADET (Malmoe, Sweden), Apr. 26, 1994, at 27 (stating Swedish company tried to bribe officials in the Pakistani foreign ministry); Peter K. Semler, *U.S. Firms Shift Strategy, Push for Anti-Corruption Law Abroad*, J. COM. (Bangkok, Thailand), Apr. 18, 1994, at 8a (reporting of kickbacks paid by British companies to Malaysian officials); *A Series of Alleged Corruption Scandals*, ECONOMIST INTELLIGENCE

use, *pot-de-vin*, *unto amarillo*, *schmiergeld*, *mordida*, *esca*, or grease payment, there is no disputing that today's global business market is riddled with corruption. All too often these "accommodating" payments target public officials in order to secure favorable treatment in transnational business matters.<sup>3</sup> As international trade and investment increases, the need for an international foreign corrupt practices treaty becomes more apparent.

This article will first evaluate past domestic and international attempts at combating transnational bribery of public officials by businesses. Next, the author will identify and describe the current international efforts in combating bribery of foreign officials. The third segment of this paper will identify why it is in the world community's best interest to adopt a multilateral treaty to fight these "accommodating" payments. The author will then propose a draft of such a treaty that would be completely different from the past failed efforts. Critical thought on why this treaty should not emulate the Foreign Corrupt Practices Act (FCPA) will be put forth. Finally, avenues will be identified which will facilitate the ultimate ratification of this draft by the international community.

## II. ANALYZING PAST INTERNATIONAL ATTEMPTS TO COMBAT CORRUPT PAYMENTS TO FOREIGN OFFICIALS

Bribes and kickbacks have gone hand-in-hand with human commerce since the birth of mankind.<sup>4</sup> In the global market place, "Corruption is common because the rusty machinery of international business calls out for lubrication."<sup>5</sup> In fact, "greasing" of public officials

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UNIT, COUNTRY REP. (New York), Oct. 18, 1993, *available in* Westlaw, Bus-Int'l Database (stating that a Turkish political party was questioned regarding irregularities of money payments from General Dynamics Corporation of the United States); *The Government Says It Will Clean Out Corruption*, ECONOMIST INTELLIGENCE UNIT, COUNTRY REP. (New York), Feb. 15, 1993, *available in* Westlaw, Bus-Int'l Database (alleging that Botswana Housing Administration is accepting bribes from foreign contractors).

3. L. Cutler & D. Drory, TOWARD AN INTERNATIONAL CODE ON ILLICIT PAYMENTS, IN EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT: MULTINATIONAL CODES AND CORPORATE CONDUCT 34-35 (Seymour J. Rubin & Gary C. Hufbauer eds., 1984).

4. See RAMSEY MACMULLEN, CORRUPTION AND THE DECLINE OF ROME (1978); JOHN T. NOONAN, BRIBES 839 (1994); John Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 J. INT'L L. & PRAC. 1009 (1993).

5. *Clean, Not Laundered*, 327 ECONOMIST 78 (1993) (reporting that former World Bank leader, Peter Eigen, speaks out on the appalling rate of bribery and extortion in international commerce and economic development).

is seen as a way of life in many societies.<sup>6</sup> Switzerland has only recently considered the revocation of a long standing law that allowed businesses a tax deduction on payments of overseas bribes.<sup>7</sup> Although there is a widespread acceptance of some forms of commercial "accommodation" payments, both the United States and the international community have made several attempts to curtail ongoing corrupt payments to public officials.

Nearly every nation has made it a crime to bribe or attempt to bribe its state officials.<sup>8</sup> The United States is the only nation that currently has domestic laws in place to outlaw bribery of foreign public officials.<sup>9</sup> The FCPA<sup>10</sup> is America's main weapon in fighting illicit payments to public officials overseas. The Watergate investigation's exposure of huge secret corporate slush funds, used to finance bribery of foreign officials, acted as the catalyst for the formation of the FCPA.<sup>11</sup> The FCPA was an attempt to halt the perceived erosion of corporate America's integrity.<sup>12</sup> The American legislature seized the initiative and passed the FCPA provisions in 1977 assuming that a universal treaty was probable, impending, or at

6. See RICHARD SCHAFFER ET AL., *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* 416-19 (2d ed. 1993) (noting the cross cultural acceptance of bribery of foreign public officials in the nations of Italy, Germany, France, Japan, and Argentina); SEYMOUR J. RUBIN & GARY C. HUFBAUER, *EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT* 38 (1984); Steve Levine, *Survey of Azerbaijan: Oil and Bribery Lubricate The Wheels*, FIN. TIMES, Mar. 7, 1994, at 2; Susan Hayward, *Pact May Inhibit Corruption*, J. COM., Oct. 8, 1993, at 4A; Milan Ruzicka, *Bribery Mars Business Relations in Eastern Europe*, J. COM., Sept. 1, 1993, at 1A.

7. *Switzerland: Bribes May Soon Become Nondeductible*, CROSSBORDER MONITOR, Mar. 16, 1994, available in LEXIS, World Library, Busint File; see also RUBIN & HURBAUER, *supra* note 6, at 39 (Germany likewise had been granting tax deductions for these payments.).

8. See NOONAN, *supra* note 4, at 702; Louise R. Driscoll, *The Illegality of Bribery: Its Roots, Essence and Universality*, 14 CAP. U. L. REV. 1, 13-38 (1984); Judson Wambold, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 235 (1977).

9. Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185 (1994); RUBIN & HUFBAUER, *supra* note 6, at 39; E. Ernest Goldstein, *European Views of United States Anti-Bribery and Anti-Boycott Legislation*, 1 N.W.J. INT'L L. & BUS. 363, 364 (1979) (stating that every major European nation prohibits bribery of its officials). But see Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMP. L. 665 (1979) (Sweden has attempted to enforce criminal legislation that is considered similar to America's Foreign Corrupt Practices Act.).

10. 15 U.S.C. 78dd-1, 78dd-2, 78ff, 78m (1991).

11. Arthur Aronoff, *Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 789 P.L.I. 799 (1992); Raymond Dowd, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT'L L.J. 946, 948 (1991); Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235 (1982).

12. S. REP. NO. 114, 95th Cong., 1st Sess. (1977).

the very least reasonably attainable in the near future.<sup>13</sup> However, after being amended in 1988 to clarify its language, the FCPA remains a unilateral approach against foreign corruption.

The purpose of the FCPA is to deter a wide variety of activities which are deemed "corrupt." As amended, the FCPA includes accounting measures,<sup>14</sup> anti-bribery provisions,<sup>15</sup> affirmative defenses,<sup>16</sup> and an advisory opinion process.<sup>17</sup> Enforcement of this Act is the responsibility of the Securities and Exchange Commission and the United States Attorney General. Violators of the Act could face stiff monetary fines and possible prison terms.<sup>18</sup> The FCPA is only one of the many possible legislative enactments that could be used to curtail illicit payments by United States business to foreign public officials.<sup>19</sup> The FCPA has been hailed as the

13. Hirschorn, *Foreign Corrupt Practices Act Narrowed, Significantly Clarified*, NAT'L L.J., Dec. 2, 1988, at 16; Franklin Gevurtz, *Using the Anti-Trust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211 (1987). ("When Congress enacted the FCPA, it hoped that multilateral treaties would follow under which other trading nations would pledge to join in prohibiting corrupt acts committed by their own nationals."); S. RES. 265, 94th Cong., 1st Sess., 121 CONG. REC. 36, 108 (1975); S. REP. NO. 486, 99th Cong., 2d Sess. 13 (1986); 78 DEP'T ST. BULL. No. 2010 at 27 (Jan. 1978) (statement of President Carter) ("The FCPA can only be successful in combating bribery and extortion if other countries and businesses themselves take comparable action," the President presumes other countries would follow.).

14. 15 U.S.C.A. § 78m (West 1991) (provisions which require United States businesses to keep a running record of their internal financial activities so as to allow the government, among other things, to accurately investigate alleged foreign corrupt payments).

15. 15 U.S.C.A. §§ 78dd-1, 78dd-2 (West 1991) (outlawing "payments" to foreign officials or foreign political parties and provides the "knowingly" standard).

16. 15 U.S.C.A. §§ 78dd-1(b), (c), 78dd-2(b), (c) (West 1991) (providing for the "routine governmental action" exception and affirmative defenses that include a "lawful" payment in light of foreign governments laws and the affirmative defense that such payments were "directly related to promotion, demonstration or explanation of the products or services; or the execution or performance of a contract with a foreign contract with a agency thereof").

17. 15 U.S.C.A. §§ 78dd-1(e), 78dd-2(f) (West 1991) (establishing a review procedure in which specific inquiries by issuers can be analyzed in light of the FCPA prohibited acts sections); see also 28 C.F.R. § 50.18(j-k) (1991) (providing the details of the review procedure and normally requires a thirty day response time by the Department of Justice).

18. 15 U.S.C.A. § 78ff (West 1991) (Fining could reach up to \$2,000,000.00 and prison terms as long as 5 years.).

19. RUBIN & HUFBAUER, *supra* note 6, at 37 (The Tax Reform Act of 1976 and the International Security Assistance and Arms Control Act of 1976 indirectly help limit the occurrence of United States bribes targeted at overseas officials.); Aronoff, *supra* note 11 (Antitrust and RICO Laws may be basis to combat international illicit payments by United States businesses.); 134 CONG. REC. H183 & H2117 (1988) (Conference Committee rejecting Senate's exclusivity provisions of the FCPA and thus leaving the door open for concurrent prosecution under wire and mail fraud statutes).

"harshest, most comprehensive effort" to combat corrupt payments to foreign public officials.<sup>20</sup>

The 1988 Amendments were seen by most as the United States' attempt at "damage control." American law makers were criticized by their constituents for passing an act that had a chilling affect on United States businesses and exports.<sup>21</sup> The 1988 amendments were an attempt to increase the competitiveness of United States business and to provide a level playing field in the international market place.<sup>22</sup>

To date, the FCPA still suffers from many problems. The Act is still considered vague by many in the legal and international business community, and thus its enforcement is always an issue.<sup>23</sup> In light of the

20. LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 219, 221 (Norbert Horn ed., 1980).

21. Laura Longobardi, *Reviewing the Situation: What Is To Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431 (1987); S. REP. NO. 486, 99th Cong., 2d Sess. 13 (1986): The Committee recognizes the continuing need for international agreements outlawing bribery in the international marketplace. The unilateral position currently taken by the United States in terms of anti-bribery legislation, while laudable, constitutes a serious disadvantage to U.S. commerce. The Committee recognizes that bribery warps appropriate trade patterns and distorts the market as an efficient allocator of resources, but it believes that the most useful approach to this problem is a multilateral one. The Committee bill would enhance U.S. efforts to achieve such international agreement by presenting a statute that effectively curbs bribery without imposing unnecessary trade disincentives. Recognizing this need, the bill calls for renewed efforts, both on multilateral and bilateral levels, to achieve international agreement on the prohibition of bribery. *Id.* See also, 131 CONG. REC. 32,763, 32,778 (daily ed. Nov. 20, 1985) (statements that the 1977 FCPA's unclear language inhibited exports); Judith Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?* 1989 B.Y.U. L. REV. 491, 494-956 (1989). *But see* 131 CONG. REC. S15,959 (daily ed. Nov. 20, 1985) (supporting the proposition that the FCPA was not truly hampering United States exporters in the global marketplace); Judith Roberts, *The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future*, 5 B.C. INT'L & COMP. L. REV. 405, 429-30 (1982) (asserting that the FCPA is not a detriment to United States trade).

22. 134 CONG. REC. S2589-90 (daily ed. March 18, 1988). Senator Heinz participating in the debate for the passage of the Trade Act stated:

Now, however, as we continue work on major trade legislation, the issues of the FCPA and improving the trading position of American businesses increasingly focuses on both our ability to improve export performance and the various measures already in place to ensure a level playing field for all competitors. The burden of the U.S. trade deficit has enormous negative effects on the American economy, and it is clear that we have to do a better job of clearing away obstacles to export performance improvements, including ambiguities in the FCPA that discourage our exporters.

23. ALAN SWAN & JOHN MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS, 263-73, 277-84 (Doc. Supp. 1991) (interpretation problems of the FCPA Accounting & Bribery Provisions); Pines, *supra* note 9, at 195 ("Despite amendments in 1988, the FCPA is still plagued with problems that hinder its purpose. Without clearly defined terms and requirements, the FCPA proves ineffective in providing guidance for U.S. corporations.").

recent world events it has become more apparent that American companies are being locked out of today's global market place due to the FCPA constraints.<sup>24</sup> "Ineffective" and "slow" are the words used to describe the formal review process which could disclose sensitive information to the general public and business competitors.<sup>25</sup> The FCPA's major flaw however, is its unilateral character which limits its effectiveness in the world community.

On the international front, "accommodation" payments have been publicly criticized by multinational organizations, but privately ignored at the individual state level. In 1972, the International Chamber of Commerce (ICC) announced a set of rules to govern international transactions which were called "Guidelines for International Investment."<sup>26</sup> These guidelines, aimed at eliminating foreign bribes, were so controversial that the ICC members began to split their ranks.<sup>27</sup> By 1977, two camps emerged in the ICC. Some wanted to follow the United States lead and adopt provisions similar to the FCPA. However, the majority of

24. See *Operational Issues: Coping with Corruption in the CIS*, BUS. E. EUR., June 7, 1993, available in LEXIS, World Library, Bueeur File (stating foreign firms must be prepared to offer monetary incentives to Russian officials if they are to do business in the area); James Morgan, *Corruption Without Sin*, FIN. TIMES, Dec. 28, 1991, at 16 (asserting that to be competitive in India you must be willing to accept that bribery is a way of life in the business community); *Continued Official U.S. Pressure Called Key to Winning Kuwait Reconstruction Contracts*, 8 INT'L TRADE REP. 472 (1991) (stating that United States companies are at a disadvantage in the bidding process because the Middle East business environment favors bribes by foreign countries to secure contracts); *Aftermath of Gulf War: Shaping Longer-Term Stability Major Task*, GLOB. FIN. MKTS., Mar. 11, 1991 (stating United States businesses are "handcuffed" by national laws when competing for contracts in Kuwait). See generally Peter Semler, *U.S. Companies Find Corruption a Competitor*, J. COM., Apr. 18, 1994, at 8a (stating that one United States company recently lost as much as \$1.3 billion dollars in a two week period because it refused to pay grease payments for contracts).

25. SCHAFFER ET AL., *supra* note 6, at 423:

The procedure has the initial disadvantage of subjecting the transaction to the scrutiny of the public at large, including the U.S. firm's competitors. These competitors may be attracted to the situation and propose a more attractive relationship . . . . [The] delay [of the review period] is not very satisfactory in most business transactions. While the parties await a response, market conditions may change so as to make the deal less attractive or entirely unattractive for one of the parties.

*Id.* See also Katherine M. Albright & Grace Hon, *Foreign Corrupt Practices Act*, 30 AM. CRIM. L. REV. 773 (1993) (stating that the relatively ineffective review process, resulted in only one firm seeking an advisory opinion in the entire year of 1991).

26. INTERNATIONAL CHAMBER OF COMMERCE (ICC), *Guidelines for International Investment* (1972).

27. JOHN M. KLINE, INTERNATIONAL CODES AND MULTINATIONAL BUSINESS: SETTING GUIDELINES FOR INTERNATIONAL BUSINESS OPERATORS 90 (1985).

the members refused to "follow the American banner on the crusade against international bribery."<sup>28</sup>

In 1977, the ICC Counsel passed a collection of nonbinding rules of behavior to condemn bribery in the international market place.<sup>29</sup> The language used in these rules is broad enough so as to appease most ICC members. One of these basic, generalized rules was phrased, "No one may demand or accept a bribe."<sup>30</sup> Other basic rules address "kickbacks" and "off the books" secret accounts.<sup>31</sup> The ICC Counsel did, however, strongly advise the world community to formulate a treaty addressing overseas bribery.<sup>32</sup> These self-regulating rules, lacking in enforcement powers and non-binding on businesses, have generally failed to curtail "accommodation" payments to public officials by foreign companies.

Another non-binding code was announced by the Organization of Economic Cooperation and Development (OECD) in 1976.<sup>33</sup> These guidelines address multinational enterprises operating in OECD member countries.<sup>34</sup> General anti-bribery provisions found in sections 7 & 8 direct businesses to:

7. Not render and they should not be solicited or expected to render any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office.

8. Unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations.<sup>35</sup>

However, this code proved to be ineffective in preventing international illicit payments.<sup>36</sup>

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28. LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, *supra* note 20, at 228.

29. *Extortion and Bribery in Business Transactions*, ICC Pub. No. 315, (1977), reprinted in 17 I.L.M. 417 (1978).

30. *Id.* at 420.

31. *Id.*

32. *Id.* at 418.

33. *Declaration on International Investment and Multinational Enterprises* (21st June 1976) Annex to the Declaration of 21st June 1976 by Governments of the OECD Member Countries on International Investment and Multinational Enterprises, 15 I.L.M. 967.

34. DR. R. BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 38 (1977).

35. *Id.*

36. Cynthia D. Wallace, *International Codes and Guidelines for Multinational Enterprises: Update and Selected Issues*, 17 INT'L LAW. 435, 441 (1983):

The United Nations has also attempted to regulate international corrupt payments. On December 15, 1975, the U.N. General Assembly passed a resolution condemning illicit payments by multinational corporations.<sup>37</sup> This resolution states that the General Assembly:

1. Condemns all corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of host countries; . . .

3. Calls upon both home and host governments to take, within their respective national jurisdictions, all necessary measures which they deem appropriate, including legislative measures to prevent such corrupt practices, and to take consequent measures against the violators;

4. Calls upon governments to collect information on such corrupt practices, as well as on measures taken against such practices, and to exchange information bilaterally and, as appropriate, multilaterally. . . ;

5. Calls upon home governments to cooperate with governments of the host countries to prevent such corrupt practices, including bribery, and to prosecute, within their national jurisdictions, those who engage in such acts; . . .<sup>38</sup>

Other than in the United States, this proclamation was bold on words but weak in implementation. No other state, besides the United States, has implemented Section 5 to criminalize this form of corruption. Little, if any cooperation, requested in sections 4 and 5 has been put forth by U.N.

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[The] Declaration, which, along with some member-state "considerations and understandings" prefacing the Guidelines, is not legally binding by virtue of the OECD treaty itself, but could be considered to be so in any aspect in which it expresses in convenient and systematic form some existing rule of general international law, or could become so by incorporation into a treaty duly ratified by OECD member states; and . . . the Guidelines, which are expressly stated within their own framework to be "not legally enforceable . . . ."

*Id.*

37. *Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved*, G.A. Res. 3514, U.N. Doc. A/RES/3514 (1975), reprinted in 15 I.L.M. 180 (1976).

38. *Id.* at 510.



member nations. History has revealed that this was just another legislative code of conduct enforced only in "never-never land."<sup>39</sup>

An impressive attempt to forge a multilateral treaty against foreign corrupt payments came before the United Nations Economic and Social Council (ECOSOC). On May 18, 1979, the U.N. Committee on an International Agreement on Illicit Payments transmitted a proposed treaty to ECOSOC.<sup>40</sup> Article I of this draft treaty outlaws and criminalizes:

(a) The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.

(b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.<sup>41</sup>

Article II defines terms such as "Public Official," "International Commercial Transaction," and "Intermediary" with more definite terms than any multinational agreement against corrupt practices has before.<sup>42</sup> Other provisions require accounting procedures<sup>43</sup> and extradition of alleged offenders.<sup>44</sup> This draft, penal in nature, was heavily supported by the United States, but was never adopted by the United Nations.<sup>45</sup> This

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39. Timothy W. Stanley, *International Codes of Conduct for MNC'S: A Skeptical View of the Process*, 30 AM. U. L. REV. 973, 975-76 (1981).

40. U.N. ECOSOC E/1979/104, May 25, 1979, 2d Reg. Sess., Agenda Item 9; "Report of the Committee on an International Agreement on Illicit Payments on its First and Second Sessions" (E/1979/104).

41. *Id.* art. 1 Sec.(1).

42. *Id.* art. 2(a), (b), (c).

43. *Id.* art. 6.

44. *Id.* art. 11 (1). "The offenses [referred to in Article 1] shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Contracting States undertake to include said offence as extraditable offenses in every extradition treaty to be concluded between them." *Id.*

45. RUBIN & HUFBAUER, *supra* note 6, at 38; Thomas H. Reynolds, *Clouds of Codes: The New International Economic Order Through Codes of Conduct: A Survey*, 75 LAW. LIB. J. 315,

proposed treaty, like all other previous multilateral attempts to outlaw or condemn international "accommodation" payments, failed to effectively prevent multinational corporation's corrupt practices.

Recently, the world has seen a flurry of activity by international organizations determined to stamp out foreign bribery of public officials. On May 4, 1993, a new organization called Transparency International met for two days in Berlin for its inaugural conference.<sup>46</sup> This nonprofit organization is dedicated to preventing international kickbacks, bribes, and corruption. Its goal is to assure that state officials around the globe will behave in a more "transparent" and honest fashion when considering international contracts—hence the name Transparency International<sup>47</sup> Its financial support comes from United States multinational corporations and European aid agencies.<sup>48</sup>

Transparency International is a voluntary group that mirrors the tactics and structure of Amnesty International.<sup>49</sup> Transparency International seeks to bring corruption out of the shadows in hopes that such exposure will cause public opinion to demand an end to international bribery. To effectively fight bribery, Transparency International intends to introduce legislation similar to the FCPA in all OECD countries,<sup>50</sup> request chairmen to annually sign pledges against corruption,<sup>51</sup> and to work towards universal accounting procedures that would disclose overseas payments.<sup>52</sup> Slowly, this organization intends to establish "Islands of

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342-43 (1982) (stating ECOSOC attempts are bogged down by the United States attempt to impose morality and business ethics on the international community).

46. *Clean Not Laundered*, *supra* note 5.

47. *International Group Fights Corruption*, XINHUA GENERAL OVERSEAS NEWS SERVICE (New York), Nov. 30, 1993, at 130, available in LEXIS, World Library, Tctnws File.

48. *Id.* at 136; Karen Pennar, *A New Globo-Cop For Crooks In High Places*, BUS. WEEK, Dec. 6, 1993, at 136 (asserting financial support is coming from U.S. companies like Boeing and General Electric).

49. David C. Scott, *Organization Aims to Shed Light on Shady Deals Worldwide*, CHRISTIAN SCIENCE MONITOR, Mar. 23, 1994, at 6 ("[I]n the same way that Amnesty International exposes human rights abuses, T.I. is a newly formed, Berlin-based organization dedicated to exposing the misuse of public power for personal profit."); Tom Heneghan, *Fight Bribery Like Drugs, Aids—Anti-Corruption Group*, REUTERS-BERLIN, May 5, 1993, available in LEXIS, World Library, Tctnws File (stating that T.I. is attempting to bring together companies and countries that agree to crack down on corruption); Michael Holman, *New Group Targets the Roots of Corruption*, FIN. TIMES, May 5, 1993, at 4.

50. George Moody-Stuart, *Questions of Bribery*, LONDON TIMES, Nov. 15, 1993, available in LEXIS, World Library, Tctnws File; Michael Holman, *supra* note 49 (stating T.I. will also help strengthen rules and systems for international procurement bidding to help end corruption).

51. *Id.*

52. *Id.*

Integrity”<sup>53</sup> and branch out to other targeted countries<sup>54</sup> using quid pro quo tactics.<sup>55</sup>

One thing is certain, this “coalition against corruption” has developed an impressive membership roster.<sup>56</sup> Transparency International’s exposure tactics, public indignation, and quid pro strategy will likely obtain more tangible results than all of the past multilateral efforts combined. It seems clear that any anti-bribery treaty must have Transparency International’s active endorsement and support if such an agreement stands a chance at ratification.

The OECD has decided to reanalyze and take collective action against bribery of public officials by transnational corporations. On December 9, 1993, the United States presented proposals to the OECD’s “Working Party on Illicit Payments” that would make international corporate bribery a crime.<sup>57</sup> Transparency International has further pressured the OECD to revisit the issue.<sup>58</sup> Negotiations went on for over eighteen months as fears of United States extraterritorial attempts of expanding the FCPA divided OECD ranks.<sup>59</sup> Britain, Japan, Germany,

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53. Michael Holman, *Ecuador Shows Lead in International Anti-Corruption Drive*, FIN. TIMES, May 6, 1993, at 4 (stating Ecuador will be the first “Island of Integrity” as T.I. begins its work to clean up that government).

54. *Berlin Based Company Wants to Fight Corruption*, REUTERS, May 31, 1994, available in LEXIS, News Library, Reuter File (T.I. will be setting up branches in Southern Africa to compliment their work already in Benin and Ecuador.).

55. Michael Holman, *supra* note 49:

What may help make the code effective is the quid pro quo tactic T.I. will employ. Initially there may be only a few countries where business and government abide by our code, a few “islands of integrity,” as Mr. Eigen puts it [T.I. director]. The campaign will therefore focus at the start on five or six governments in developing countries and Eastern Europe who are prepared to support the code. These governments—some have already had discussions with T.I.—will restrict tendering for state contracts to corporations who have themselves signed the pledge. “We expect these leading countries will create a momentum by their example” says Mr. Eigen.

*Id.*

56. Pennar, *supra* note 48, at 136, (Former World Bank officials and anti-corruption experts, are among T.I.’s founders and directors.); Holman, *supra* note 49 (Behind the project, nearly two years in gestation, is a group of hard-headed veterans of aid, commerce and development, eminent in their own fields, and with experience spanning the developing world.).

57. Stella Dawson, *U.S. Spearheads Effort to Ban Bribes in OECD*, J. COM., Dec. 6, 1993, at 3.

58. Rosie Waterhouse, *War Declared on Corruption*, INDEPENDENT, June 7, 1994, at 7; Rosie Waterhouse, *The Good Business Guide to Bribery*, INDEPENDENT, Mar. 27, 1994, at 10.

59. Tara Patel, *OECD Reaches Compromise on Pact to Rid Governments of Corruption*, J. COM., May 2, 1994, at 3A; George Graham, *OECD to Discuss Policy Against Bribery*, FIN. TIMES, Apr. 25, 1994, at 6 (Although criminalization raises complex questions about the extraterritorial reach of national laws, specific measures have been proposed to ensure that bribes

and France have all refused to allow the formation of a binding criminal agreement against corrupt payments.<sup>60</sup> Britain lead the coalition to block the United States attempts to secure a multinational agreement against foreign corrupt bribery since many English economists see bribe offerings as "good business."<sup>61</sup>

Although the final agreement had not been released to the general public at the time of writing this work,<sup>62</sup> it will fall short of criminalizing international bribery. The guidelines are intended to be a series of proposals that member nations can adopt.<sup>63</sup> The codes are to encourage the review of domestic criminal, civil, and administrative regulations and to take steps in combating bribery.<sup>64</sup> The code also encourages international cooperation and information exchange between member nations.<sup>65</sup> This new agreement basically allows OECD members to pick and choose whatever steps they deem necessary to fight bribery in international commercial transactions.<sup>66</sup> Once again, the United States attempts to criminalize transnational bribery were soundly rejected by the international community.

The United States is again attempting to create a multinational agreement to fight corrupt payments in international business transactions. The United States government has decided to push the new World Trade Organization for laws paralleling the FCPA.<sup>67</sup> President Clinton addressed

paid by companies are not treated as tax-deductible business expenses.); George Graham, *OECD Meets in Effort to Fight Bribery*, FIN. TIMES, Feb. 14, 1994, at 5. Other OECD members are concerned of U.S. attempts to force criminal laws onto other nations. *Id.*

60. Rosie Waterhouse, *A Slap on the Backhanders: Trading Nations Are Finally Trying to Crack Down on Official Bribery*, INDEPENDENT, May 24, 1994, at 16; Rosie Waterhouse, *Britain Spurns U.S. Over Bribes*, INDEPENDENT, Apr. 3, 1994, at 4; Rosie Waterhouse, *The Sleazy State: Britain Resisting Moves to Halt Bribes to Officials*, INDEPENDENT, Mar. 16, 1994, at 3.

61. *Bribes 'Can Be Good Business'*, DAILY TELEGRAPH, Aug. 31, 1993, at 4, available in Westlaw, Int-News Database.

62. This paper is based on research available before June 12, 1994. The 1994 OECD declaration was expected to be widely available within a month after its late June or July signing.

63. *OECD Recommendation on Measures For Fighting Corruption in International Business Transactions*, AGENCE EUROPE, June 4, 1994, available in Westlaw, Int-News Database.

64. *Id.*

65. *Id.*

66. George Graham, *U.S. Seeks OECD Foreign Bribes Ban: Many Countries Wary of Extending Laws Beyond Their Own Frontiers*, FIN. TIMES, Dec. 6, 1993, at 3 ("U.S. senior official said the OECD working group's recommendations amounted to a shopping list from which countries could pick one or two measures . . .").

67. *GATT: United States Will Urge Other Countries to Adopt Anti-Bribery Rules in New WTO*, INT'L TRADE REP., Mar. 16, 1994, at 11. (Mickey Kanter is quoted as saying: "There is

international bribery at Miami's Summit of Americas held in December of 1994.<sup>68</sup> Transparency International has lobbied the Clinton Administration for just such an agenda.<sup>69</sup> It is unlikely these new attempts will secure a multilateral agreement. Since the United States continues to demand international criminalization of transnational bribery, it will leave the negotiation table empty handed and its attempts will again be branded as "extraterritorial."

One can learn from past and present attempts at adopting a legally binding anti-corruption code. A future code based on the FCPA's "criminalization" will be stigmatized as American "moral imperialism" and ultimately fail. However, codes without some enforcement mechanism will be legally non-binding and ineffective. Finally, to effectively define a "bribe", one must evaluate each individual nation's customs.

An analysis of past attempts to construct a universal code reveals two general camps that emerge in the negotiation phases. These distinct theoretical groups seem to counter each other's attempts and eventually stifle any multinational enterprise (MNE) code.

One is known as the "maximalist position", and favors legally binding, internationally enforceable rules of conduct for MNEs. This position is adhered to generally by the international trade union movement and developing nations. The other is the so-called "minimalist position", and promotes the notion of voluntary rather than legally enforceable guidelines. This position is predictably advocated by the international business community and generally by highly capital-intensive industrialized nations.<sup>70</sup>

With the exception of the United States, this division seems to be true as to a country's alignment concerning both recent OECD negotiations and acceptance of Transparency International. America and developing

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no reason we shouldn't . . . insist [that] our trading partners adhere to the same standards we have been adhering to for years. It is not fair for American business to adhere to standards that are proper and that should be adhered to around the world and others don't . . . . We are going to insist on that . . . because we see trade as a two-way street—comparability, mutuality of obligation and were going to continue on that path." See also Aaron Schildhaus, *Stop the Business Bribery Game*, J. COM., Apr. 21, 1994, at 5.

68. Michael Holman & Stephen Fidler, *Corruption Drive on Cards: American Leaders Urged to Give Priority to Crusade*, FIN. TIMES, Mar. 7, 1994, at 5.

69. Scott, *supra* note 49.

70. Wallace, *supra* note 36.

countries are pushing for an international agreement with strong anti-bribery language. However, nations like Japan and Britain want only another general proclamation and a non-binding declaration.

In between these two poles is a "zebra" position composed of both binding and non-binding rules containing words like "should" or "shall."<sup>71</sup> Realistically, a proposed international treaty against illicit payments must satisfy both "Minimalists" and "Maximalists" and fall within the "zebra" zone to have a chance at ratification. Furthermore, a proposed treaty must avoid imposing criminal sanctions which led to the demise of its predecessors.<sup>72</sup> Enforcement of treaty provisions must come from non-government entities since state officials tend to adopt broad statements of policy but never truly act on them. Finally, any treaty must respect principles of sovereignty if such an agreement is to be ratified.<sup>73</sup>

### III. THE NEED FOR A MULTINATIONAL TREATY TO COMBAT INTERNATIONAL FOREIGN CORRUPT PAYMENTS

Transnational illicit payments to foreign public officials demand the world community's attention. Nations have a compelling interest to prevent the bribery of their own officials. Such prevention can be effective only through international cooperation. The United States' interest in passing such a multilateral treaty is apparent considering that the FCPA remains the only unilateral approach. An analysis of these foreign payments shows that other nations have a vested interest in following America's lead.

These illicit payments undermine the values which democratic nations are founded upon. Illicit transnational payments to public officials improperly influence and precipitate decisions potentially to the best interests of the citizens of the host nation.<sup>74</sup> Once a bribe is accepted, the public official is susceptible to blackmail tactics. Bribes aimed at political parties conceptually undermine both the democratic process and diminish

71. *Id.*

72. Reynolds, *supra* note 45, at 343. States have rejected American moral imperialism and generally have not been "particularly disposed to assist the United States out of problems of its own making" [referring to the FCPA which put U.S. companies at a disadvantage]. *Id.*

73. *Id.* (A certain amount of caution must be exercised in attempting to appraise what are properly national functions and what are more suitably international functions in regulating the MNE, since the multinational enterprise has been perceived as a political as well as an economic phenomenon, and legal "answers" and categorizations cannot be expected to eliminate all the political repercussions stemming from MNE activity.)

74. *Berlin Based Company Wants To Fight Corruption*, REUTERS, May 31, 1994 available in LEXIS, World Library, Txtnews File (contending that bribery distorts decision making).

the hope that the government will be impartial and represent the interests of its citizens.<sup>75</sup>

Bribery causes political instability and interferes with foreign policy. Bribery by foreign business entities have contributed to the fall of governments in Japan, Bolivia, Honduras, the Cook Islands, Italy, and the Netherlands.<sup>76</sup> A nation's ability to conduct effective foreign policy is compromised when its national corporation's corrupt practices are exposed.<sup>77</sup> A recent transnational bribery incident involving English firms and the government of Malaysia has caused a breakdown between the two nations on foreign investment and trade levels.<sup>78</sup> Such a breakdown could have been prevented if an international agreement was in place. Foreign corrupt payments also produce waste and distort prices in host countries. The foreign official who is under the influence of a bribe, may make decisions that are detrimental to the country's economy.<sup>79</sup> Bribery induces public officials to favor foreign firms which offer accommodating payments even though such contract awards will ultimately distort consumer prices.<sup>80</sup> Transparency International's interim chairman has explained:

75. Arthur Leathley & Jonathan Prynn, *Labor Deputy Denounces 'Odor of Corruption'*, LONDON TIMES, June 23, 1993 (Labor trade and industry spokesman is quoted as saying: "Britain has no right to interfere in the elections of foreign countries. Foreigners have no right to interfere in the elections of Britain. Party of the foreign millionaire was not likely to understand the pressures on pensioners at home."); *U.S. to Propose Steps Against Bribing Foreign Officials*, Kyodo News, Dec. 2, 1993, available in Westlaw, Japanecon Database (stating that "bribery seriously undermines the very democratic institutions the OECD seeks to promote").

76. Pines, *supra* note 9, at 205; See also Raymond J. Dowd, *Civil Rico Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT'L L.J. 946, 947. Revelations of United States bribery of foreign officials overseas in mid-1970's caused the resignation of many important foreign officials in Japan, Italy, and the Netherlands. *Id.*

77. RUBIN & HUFBAUER, *supra* note 6, at 40. Dowd, *supra* note 76. The FCPA was passed to prevent this very same interference with foreign policy.

78. *Malaysia Bans British Firms Over Corruption Allegations*, Kyodo News, Feb. 25, 1994, available in Westlaw, Japanecon Database.

79. *The Political Scene: Corruption is Spreading*, ECONOMIST INTELLIGENCE UNIT, June 1, 1993 available in Westlaw, Bus-Intl database (reporting that Mozambique politicians sell off land cheaply to foreign investors who are bribing the decision makers); Heneghan, *supra* note 49 (claiming foreign illicit payments are robbing the third world of needed resources).

80. Waterhouse, *supra* note 58. Bribery and corrupt practices distort decision-making. Contracts may be over-priced and therefore the country over-charged, as the contract is inflated by as much as 20 percent to accommodate the bribe. *Id.* Bribes may lead to the selection of incompetent or unscrupulous suppliers and deliberate cost-cutting. *Id.* The availability of "back-handlers" may also encourage countries to buy goods and services that are unsuitable for or

The damages to third world economies...goes beyond the fact that the wrong supplier or contractor might be chosen. When a government is persuaded—that is bribed—that it needs aircraft or a food processing plant which are unnecessary or unjustified, not only is there a loss of scarce foreign exchange resources. Those resources will have been deprived from worthwhile projects.<sup>81</sup>

In other words, international accommodating payments promote inefficiency and waste.

Vital world trade and investment is also a victim of bribery. Foreign illicit payments can produce a “backlash” against the country of origin and international business generally.”<sup>82</sup> As a result, protectionists and isolationists ultimately gain credibility and acceptance from the local population.<sup>83</sup>

All nations have an interest in fighting bribery, but why the need for a multilateral agreement? Applying the FCPA extraterritorially will offend other sovereigns and ultimately create more problems.<sup>84</sup> Multinational corporations by their very nature span numerous sovereigns. They can possess more political and economic clout than some governments. International bribes come from entities located outside the host country. As a result, such acts of bribery are likely beyond the jurisdiction of the host country’s law. For a country to effectively fight the bribery of its public officials, some international tool is needed to punish outside bribery attempts. Therefore, “[i]t is necessary to have international measures that match the international dimensions of this

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surplus to their needs. *Id.* See also, Yuri Lopatin, *OECD Urges Step-Up of Action Against Corruption in Trade*, Tass, June 3, 1994, available in LEXIS, World Library, Tass File.

81. Holman, *supra* note 49.

82. RUBIN & HUFBAUER, *supra* note 6, at 40.

83. *Id.*

84. DIETER LANGE & GARY BORN, *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS* 3 (ICC 1987) states:

1. Extraterritoriality creates considerable commercial and legal uncertainty, particularly where unpredictable applications of national competition and securities laws are involved. This uncertainty discourages international businesses from engaging in productive trade and investment . . . . 2. The overall impact of the extraterritorial application of national laws is to discourage or prevent useful economic activity in the form of international investment, and to reduce the profitability of existing investment. This distortion of market processes, caused by extraterritoriality, reduces productive economic activity and the employment opportunities and income that would flow from such activity.



problem.”<sup>85</sup> A multinational treaty is the only way to effectively deter foreign corrupt practices.<sup>86</sup>

In light of the past attempts to form an international agreement and the need for a multinational approach, this author proposes a solution to the problem of corrupt overseas payments.<sup>87</sup> This work proposes a mechanism of enforcement based on private causes of action rather than making accommodation payments a crime, an approach that has doomed earlier agreements. This work also uses the tools of disclosure and exposure to deter possible offenders. Finally, the proposed treaty respects each individual nation's political and cultural customs regarding accommodating payments. As a result, this unique draft has a better chance at ratification and deterrence than previous multinational agreements.

The preamble of this proposed treaty sets forth recitals and the ultimate goal to be achieved. The recitals are necessary to establish why transnational bribery is detrimental to individual nations and the world community as a whole. The recitals conclude by stating that only multilateral cooperation can eliminate these illicit payments. The purpose of the strong condemnation language in the resolution clause is to reflect the world community's intention to completely eliminate this form of corruption.<sup>88</sup> These statements are modeled after language adopted by the United Nations General Assembly.<sup>89</sup>

Identifiable terms are essential to the treaty if it is to be functional. Therefore, Article I sets forth concise definitions of terms used throughout the treaty which would otherwise impede its effectiveness. The definition of the term “corrupt payment” is taken in light of the host country's laws. Likewise, local laws concerning the definition of the word “illegal” are paramount when a corrupt payment is alleged to have occurred. References to local laws are an effort to respect the world's diverse

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85. RUBIN & HUFBAUER, *supra* note 6, at 40.

86. United Nations Commission on Transnational Corporations: Information paper on the negotiations to Complete the Code on Transnational Corporations, U.N. Doc. E/C. 10/1983/S/2 of Jan. 4, 1983, *reprinted* in 22 I.L.M. 177 (1993) sec. 3. *See also* ICC *Guidelines*, *supra* note 26 (introductory comments stating that “Complementary and mutually reinforcing action by both governments and the business community is essential.”).

87. *See infra* pp. 31-39. Proposed Treaty on the Prevention of Illicit Payments (using language adopted from existing domestic and international documents).

88. A. A. Fatouros, *On the Implementation of International Codes of Conduct: An Analysis of Future Experience*, 30 AM. U. L. REV. 941, 943, 947 (1981) (explaining that states seem to define a code of conduct as a legal instrument embodying a set of principles and rules that limit the behavior of international actors).

89. G.A. Res. 3514, *supra* note 37.

cultures and legal systems when it comes to defining bribery. By acknowledging individual local laws and avoiding a universal definition of these terms, this treaty guards the notions of sovereignty and increases its chances of ratification.<sup>90</sup>

Article I defines the term "intermediary" and "international commercial transaction" in a manner that is parallel to ECOSOC's proposed treaty.<sup>91</sup> The definition of the term "knowingly" is similar to the definition of the term "scienter" in the FCPA, and encompasses the "knew or should of known standard" that is essential to avoiding the defense of ignorance. The "reason to know" standard of the 1977 FCPA has not been adopted because it was perceived by many American businessmen and legal advisors as too vague and confusing.<sup>92</sup> The definition of the term "offended private party" is an attempt to limit the number of parties who may bring an action by imposing a standing requirement. The term "payment" is broadly defined to include any pecuniary gain or social advantage that realistically could influence the decision of a public official. Language from both ECOSOC's proposed treaty<sup>93</sup> and the FCPA<sup>94</sup> help to broadly define the term "public official" so that it includes almost any governmental decision maker. Finally, the definition of "suspect private party" allows all transnational corporations to fall under this treaty even though their home country may not be a signatory to it. By holding all international commercial entities accountable, this treaty will be a true deterrence from the common practice of commercial bribery.

Article II is an attempt to clearly define what activities will not be tolerated. Article II sets forth specific conduct which is more succinct than the vague wording of the ICC guidelines and OECD general pronouncements.<sup>95</sup> This article therefore clearly puts forth standards of conduct that individual entities can realistically be held accountable to. Article II establishes enforceable criteria, and targets corrupt payments or

90. Chelminski, *Pots of Wine*, SAT. REV., July 9, 1977, at 14; SCHAFFER, *supra* note 6, at 416-19 (discussing cultural differences as to what is "illegal" or "accepted" in the context of bribery).

91. U.N. ECOSOC, *supra* note 40, at 3.

92. Gary M. Elder & Mark S. Sableman, *Negligence is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819 (1981) (addressing the uncertainty of the original FCPA scienter requirement); *see also* SWAN & MURPHY, *supra* note 23, at 263-73.

93. U.N. ECOSOC, *supra* note 40, at 3.

94. 15 U.S.C. §§ 78dd-1(f)(1), 2(h)(2) (West 1991).

95. Compare G.A. Res. 3514, *supra* note 37 (ambiguously stating condemned behavior and what should be done by home government in response to said behavior) with U.N. ECOSOC, *supra* note 40, art. 1, sec. 1 (enumerating behavior in violation of proposed treaty).

offers thereof to political parties and to public officials.<sup>96</sup> Since most nations criminalize bribery of their public officials, this treaty should be limited to multinational commercial transactions and not domestic bribery. Accordingly, article II concludes with a limiting phrase restricting this agreement to international commercial transactions.

Article III sets forth affirmative defenses and further limits the scope and applicability of this agreement. It adopts the logical and often used defenses found in the FCPA.<sup>97</sup> Section (a) of this article also honors an individual nation's laws and the general notions of sovereignty. Section (a) and other provisions which defer to national laws, neutralize any charges of extraterritoriality. Such charges have consistently been brought up in OECD discussions and have ultimately derailed negotiations on the formation of an international anti-bribery treaty.<sup>98</sup>

Section (d) of Article III expands available affirmative defenses even further. A "good faith" defense is created so that an administrative board has the flexibility to decide each case in light of the particular facts and circumstances surrounding a transaction. Furthermore, a reliance defense based on an advisory opinion is available to possible respondents. This defense will promote the use of the advisory opinion process established in Article VIII, and can offer clear advice to avoid possible bribery scenarios. A similar process is utilized in the FCPA.<sup>99</sup>

Article IV is a necessary provision in this draft. This Article requires accounting procedures which are essential to realistically detecting alleged illicit payments. This Article encourages states to supplement their current accounting procedures by adopting bookkeeping standards promulgated by the Article VII Committee. Forcing signatory countries to adopt Committee accounting standards would be seen as an attempt to abrogate a sovereign's rule making authority and would be rejected by most states. However, these disclosure requirements may prevent future bribes.<sup>100</sup> Therefore, each individual state should be allowed to decide

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96. See U.N. ECOSOC, *supra* note 40, art. 6 (modeled after 15 U.S.C. §§ 78dd-1(a)(1)-(2), -(2)(a)(1)-(2) (1988)).

97. 15 U.S.C. §§ 78dd-1(b)-(c), 78dd-2(b)-(c) (1988).

98. Patel, *supra* note 59; see Reynolds, *supra* note 45.

99. See 15 U.S.C.A. §§ 78dd-1(e), -2(f) (West 1991) (opinions of the Attorney General).

100. RUBIN & HUFBAUER, *supra* note 6, at 42-43. This approach [disclosure] involves the public reporting of foreign payments. The underlying idea is, as Justice Brandeis said:

[T]hat sunlight is the best disinfectant . . . . The simplicity of these requirements makes them relatively easy to enforce. No question about intent, or reasonable knowledge that a bribe would be paid to a foreign official, will arise. The minimum thresholds would eliminate any need to report the relatively innocuous "grease" payments. These disclosures could be made annually and with a significant time delay

whether it will adopt the Committee accounting procedures, so long as their procedures are sufficient to track corrupt payments.

Article V's purpose is to place the international business community on notice of this treaty. This Article is an attempt to inform all international business contractors that a treaty is in existence and they should be aware of its provisions. Like Article IV, this part uses the phrase "under penalty of law." This is merely an enforcement mechanism to encourage international business contractors to circulate this clause in their agreements. Each signatory country will directly determine and enforce this phrase within its territory. However, the failure of a sovereign to do so may result in Article II (a)(iii) arbitration.

The present tax deductions of illicit payments should cease if the international community is serious about combating these bribes.<sup>101</sup> Article VI encourages signatories to disallow tax deductions for illicit payments. This Article may now be more warmly received since many States have recently questioned or abandoned their legislation which allows these deductions.<sup>102</sup> Without Article VI, the laws of signatories, which encourage overseas bribery, would circumvent this draft's recitals and resolutions.

The use of the word "should" in Article VI is an attempt to cater to "Minimalists."<sup>103</sup> However, the presence of Article VI appeases "Maximalists" as well. If a signatory country wishes to preserve its present bribery tax deduction laws, its multilateral companies will be more inclined to offer bribes. As a result, businesses in these countries are more likely to be "suspect private parties" in this treaty's review process. After several adverse Article XII Certifications are filed against a country's multinational corporations, that nation will be economically pressured to repeal its tax deduction regulations. The economic benefit of these

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after the year-end, in order to protect a corporation's legitimate interest in the secrecy of ongoing negotiations . . . . If known in advance that embarrassing payments would have to be disclosed, most such payments would not be solicited or made. In this modest way, we might achieve an international regime to ensure that foreign bribery is finally halted.

*Id.*

101. *Id.* at 38-39 (noting states "have endorsed high-level policy statements against corrupt payments," but foreign countries' tax deduction for bribes show an inherent legitimization problem).

102. *Switzerland: Bribes May Soon Become Nondeductible*, *supra* note 7; Patel, *supra* note 59, at 3A.

103. Wallace, *supra* note 36, at 443. This phrase makes Article VI nonbinding and satisfies minimalists since they believe: "Any code of conduct for transnational corporations should not be binding, since the diversity of national situations makes it impossible to apply uniform rules to all countries." *Id.*

deductions to a country would be offset by the loss of international business. Therefore, this Article is also an attempt to find middle ground between both camps and increase the chances of ratification.

The Corrupt Practices Committee is one of the two regulatory bodies created by this draft. The administration of this treaty is left to the Corrupt Practices Committee and the Corrupt Practices Commission since past experience has revealed that states lack the necessary attitude to fight overseas corrupt payments.<sup>104</sup> Article VII establishes the Corrupt Practices Committee with the responsibility for the treaty's smooth operation. Sections (a), (b), and (d) establish the membership of this Committee. The membership compensation assures neutrality and gives signatory countries a chance to participate in the rule making process in order to protect their sovereign rights.

Article VII (a)(iii) arbitration is one of the various powers and responsibilities the Corrupt Practices Committee will receive. "In-house" disputes between members should be settled in arbitration to lessen the chance of a mutual recession of the agreement. Another important provision in Article VII is the Committee's ability to create supportive subcommittees. These inferior bodies will aid in administering the Committee's various functions. Sections (a)(iv) and (g) set up a mechanism of checks and balances between the treaty's regulatory bodies.

An advisory opinion process, similar to the FCPA's, is also provided by this draft agreement. Article VIII requires that all requests must originate by possible "offending private parties" or signatory countries. This Article further limits the review procedure to nonhypothetical situations. All of these committee advisory opinions should logically be privately heard to avoid public disclosure of surrounding facts. This is to safeguard international business leads and promote the use of this process. Article VIII requires a mandatory fourteen day response period which is aimed at avoiding the problems of delay that have discredited the FCPA.<sup>105</sup>

The second body created by the proposed treaty, the Corrupt Practices Commission, is established by Article IX. This would be considered the judicial body of the treaty since its main function is to hear disputes concerning possible corrupt practices. This body is a combination of nationals from various signatory countries. Sections (a) and (b) structures this body to allow all member states some participation in the judicial review process. Section (b) ensures that a "suspect private party"

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104. RUBIN & HUFBAUER, *supra* note 6, at 38-39 (claiming many countries seem unreliable and uninterested in fighting these illicit payments).

105. Albright & Hon, *supra* note 25.

from a signatory country will not be judged by a commission composed entirely of foreigners. By allowing at least one fellow national to participate in the complaint process, "suspect private parties" may feel that proceedings will be more equitable.

One of the more controversial provisions of this treaty is found in Article IX (a)(ii). This subsection gives the Corrupt Practices Commission international discovery powers. In light of the fact that a multinational agreement was necessary to facilitate international discovery,<sup>106</sup> this subsection is somewhat controversial. However, this provision is necessary to facilitate the investigatory stage of any proceeding. These discovery powers would only be possessed by the Commission and not the individual private parties. Article XV (a) would protect sovereignty rights since each nation is only obligated to assist in discovery to the degree their national laws allow.

Article X's nature is one of limitation. It restricts the right to file a complaint to certain entities and provides for a statute of limitations. To prevent the filing of frivolous complaints by private parties, Article X provides for the award of attorney's fees if the Corrupt Practices Commission finds that a complaint was not filed in good faith. Article X is one of the unique factors which distinguishes the proposed treaty from its predecessors. This Article provides for a private cause of action, which may be a more effective means at controlling corrupt payments.<sup>107</sup> As a result, nations would not be responsible for coming forth with allegations; rather independent private entities would pursue their claims.

The most controversial provision is located in Article XI. Article XI provides a confidential complaint procedure to guard internationally sensitive business documents. Section (b) sets forth the standard of proof in these proceedings. Since bribery is shielded in the "shadows" of commercial trade, its very nature is one of secrecy and underhandedness. As a result, evidence is hard to obtain. Therefore, an evidentiary standard of "more likely than not" is the most appropriate standard of proof for plaintiffs to meet. More stringent standards would be impossible to prove. "Suspect private parties" are in a better position to prove the nonoccurrence of a bribe since they were supposedly in union with the governmental authorities they allegedly bribed. This standard is fair since

106. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Hague Evidence Convention, June 1, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241.

107. Pines, *supra* note 9, at 191 (claiming that a cause of action in the FCPA would significantly improve enforcement of the Act); RUBIN & HUFBAUER, *supra* note 6, at 38-39 (claiming that many countries seem unreliable and uninterested in fighting these illicit payments).

"suspect private parties" can more easily account for all their expenditures.

Article XI section (c) is another controversial provision. This section creates a presumption of guilt if one party refuses to take part in the complaint process. This vital provision will encourage participation in the judicial process and help facilitate the facts surrounding transnational commercial activities. However, some signatory countries may find this provision offensive to local constitutional laws or rules of evidence. This section could be interpreted as infringing on one's right against self incrimination. Furthermore, many countries would perceive this as a violation of the presumption of innocence that all suspects should be afforded.

However, this provision is not as controversial as potential critics would suggest for two reasons. First, Article XV limits the applicability of Article XI (c) since it provides for the respect of laws of contracting nations. Second, this treaty is not criminal in nature and only establishes civil causes of action. Criminal liability will only attach if the "suspect private party's" home state has adopted legislation similar to the FCPA.

Article XI concludes with provisions that concern the disposition of a claim. Subsection (d)(i) provides that if a corrupt payment is not discovered, the Committee will seal the proceeding's records to protect confidential business.<sup>108</sup> This subsection also empowers the Committee the option of awarding attorney's fees. Subsection (d)(ii) orders the release of all documents to both parties if a claim is certified (i.e. a corrupt payment is discovered). This provision is targeted at supplying the "offended private party" with necessary documentation to facilitate a civil suit which may be filed pursuant to Article XII (c).

Article XII (a) mandates that the Corrupt Practices Committee announce its findings to the general public. This essential provision is a method of punishing transnational businesses that participate in corrupt practices, and it also deters future businesses from offering bribes to public officials. An international business does not want to be stigmatized as a corrupt and bribing entity because public opinion of that business would become unfavorable resulting in a backlash against that company's goods and services. Therefore, the tactic of exposing and announcing the corruption to the world would be an effective deterrent and punishment even without criminal sanctions attaching. This tactic is used by

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108. This provision is to avoid one of the draw backs of the FCPA's advisory opinion process. See SCHAFFER, *supra* note 6, at 423 (stating that the FCPA review process has the potential to disclose information to international competitors and thus is not often used).

Transparency International to counter world corrupt payments and may be more effective than any fine or penalty.<sup>109</sup>

Under Article XII (b), all signatory countries agree to refrain from doing business with "suspect private parties" who are determined to have bribed a public official. This provision's detrimental to multinational corporations that bribe public officials because they could lose a substantial amount of transnational contracts. Section (c) allows an "offended private party" to file a lawsuit in its home country. Although section (d) encourages signatory countries to honor the foreign judgments for collection purposes, it still preserves a country's right to question such foreign judgments.<sup>110</sup>

International criminalization of transnational bribery of public officials would be ideal from the American standpoint. However, past attempts by the United States to secure such provisions have doomed multilateral negotiations and have been labeled as "American Imperialism."<sup>111</sup> Therefore, Article XIII only encourages countries to adopt penal laws to counter overseas bribery by their nationals. However, with or without these penal laws, this treaty's effectiveness is based on a civil recourse that will eventually make bribery economically cost inefficient.

Article XV (a) protects a contracting nation's sovereignty by preventing the proposed treaty from contradicting its laws. This provision preserves a nation's sovereignty and reduces the need for reservations which ultimately would be filed to protect national laws. It is also important to provide financial support for the bodies created by this treaty. Therefore, section XV (a) secures funds for the Commission and Committee by requiring all signatories to provide assistance for the "general operation of this treaty."

Articles XIV and XVI are procedural items. Article XIV is created so that member states can monitor each other's compliance. This is a common and necessary provision in many treaties.<sup>112</sup> Article XIV becomes a necessary provision because the actions of states have often contradicted their publicly stated policies regarding overseas bribery.

109. Scott, *supra* note 49, at 6.

110. Sec. (d) is modeled after Article 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Mar. 18, 1965), *reprinted in* 4 I.L.M. 532 (1965).

111. Reynolds, *supra* note 45, at 343.

112. Kenneth Abbott, *Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993) (stating that clauses providing mechanisms of monitoring promote trust among signatory parties and dispel many wrongful accusations).



Article XVI delays the commencement of responsibilities under this treaty until there is a sufficient number of contracting nations.<sup>113</sup> This practical provision is modeled after a suggested change to the Economic and Social Council's draft treaty.<sup>114</sup>

This purported treaty is unique but controversial. Formation of a treaty is a ritual of stages.<sup>115</sup> The purpose of this work is to provide the first step in this diplomatic process. Its other purpose is to promote critical thought on this issue. Proposing a treaty that contains some very controversial provisions will surely touch the nerves of many international legal practitioners. However, this draft is not so controversial as to be unattainable. Its provisions are targeted to preserve the sovereignty of individual nations, and it appeases both Maximalist and Minimalist theorists. This treaty is feasible and it can be ratified by enough nations to effectively deter illicit payments in the global market place. The key is to secure its acceptance by the world community.

## V. STRATEGIES TO SECURE SIGNATORIES

The ratification of this treaty, like many other international documents, will be a slow tedious process. There are various ways to secure the world community's acceptance. Unfortunately, acceptance of this treaty will not occur quickly, and it will be accompanied by considerable debate. However, once enough signatories are mustered, world opinion will most likely force the remaining countries to enter into the treaty. Their failure to sign this treaty may result in a "Sleazy State" stigmatization.<sup>116</sup>

The vital ingredient in the ratification process is the willingness of the United States to compromise. Congress must realize that it will not succeed in cloning the FCPA into an international treaty.<sup>117</sup> The United States should embrace this treaty because of its unprecedented potential at curtailing corrupt payments. Even though the language and penalties are

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113. Bonnie Jenkins, *The Role of the Attorney in the Treaty Making Process*, 6 INT'L L. PRACTICUM 29 (1993) (stating that such provisional application clauses are not uncommon and serve a useful and necessary purpose).

114. U.N. ECOSOC, *supra* note 40. Notes accompanying the draft discuss the addition of an "Article 13" which contains provisions on entry into force. *Id.*

115. Kenneth Vandeveld, *Treaty Interpretation Form a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281 (1988) (stating that the process of treaty formation includes text presentation, issue identification and issue resolution).

116. Waterhouse, *The Sleazy State: Britain Resisting Moves to Halt Bribes to Officials*, *supra* note 60, at 3.

117. Repeated past attempts have failed. *See id.* at 10-20.

inferior to the FCPA, the United States should compromise and push for its international acceptance. Once the acceptance of the treaty by the United States is attained, the first step in the ratification process will be complete.

Once the United States supports this draft, America's economic and political power can be a valuable tool in facilitating the adoption of this treaty by the world community. The United States' foreign policy must reflect its firm commitment to fight foreign corrupt practices. Now that the cold war is over, America can be more flexible with its foreign policy and aid. As a result, the United States could restrict its foreign aid to signatories of this draft. This policy would greatly increase the number of parties to this agreement. The United States could place this draft on the "bargaining table" during the next round of General Agreement of Tariffs and Trade negotiation sessions. This would start dialogue on the topic and publicly expose those countries who are reluctant to fight bribery. The United States could also condition future bilateral friendship, commerce, and navigation treaties on the prerequisite that its partner be a signatory to this treaty.

Directing the public's attention to certain transactions or governmental actors is a vital tool in securing this treaty's acceptance.<sup>118</sup> Therefore, Transparency International is an essential group that can help to secure ratification of this treaty. Transparency International's unique status as an independent organization allows it to confront and expose foreign corruption without jeopardizing "political relations".

Transparency International could use its tactics to target certain key countries and indirectly force them to become signatories. For example, Transparency International could promote a public campaign designed to expose English officials who take bribes.<sup>119</sup> A powerful media campaign uncovering graft in the English government would likely enrage English citizens and force local politicians to address the issue.<sup>120</sup> Eventually, the issue would become detrimental to any English politician who disfavors the signing of such a treaty. Once England becomes a signatory, another country is targeted and a "snowball" affect will eventually occur.

118. This is an effective tactic used by T.I. through its Directors who write letters to local press agencies. See e.g., *Implications of British Overseas Aid*, TIMES, Jan. 28, 1994, available in LEXIS, World Library, TTimes File (letter written by Jeremy Pope, Managing Director of T.I.); *Questions of Bribery*, TIMES, Nov. 15, 1993, available in LEXIS, World Library, TTimes File (letter written by George Moody-Stuart Chairmen of T.I. in the United Kingdom).

119. England is used for illustrative purposes only. The author does not suggest that English Officials are necessarily corrupt.

120. The FCPA was born out of the same public outrage. See Timmeny, *supra* note 11.

Introducing this draft as a protocol or a supplemental document to an existing treaty may help facilitate its acceptance. There are currently treaties in place that this agreement could logically supplement.<sup>121</sup> The strategy is to target an existing treaty that is logically related to this agreement. This draft would become an extension of the already established goals of operational treaties and thus cast it in a less radical light.

Despite its inadequate attempts to date, the OECD is still a vital actor in the adoption of this treaty. The majority of multinational corporations can be found within the territory of OECD member nations.<sup>122</sup> Furthermore, the bulk of international commerce comes from nations in the OECD.<sup>123</sup> Any treaty receiving the blessing of the OECD will significantly affect international foreign corrupt practices. Therefore, Transparency International and the United States should concentrate on pressuring individual OECD members to become signatories. A combination of diplomatic maneuvering and political pressure arising from the discontent of the public, can result in the world community's leaders embracing this treaty.

## VI. CONCLUSION

Transnational bribery has been an issue before the world community for a generation now. Prior multinational attempts at reducing these illicit payments have been ineffective. The United States continued demands for the international "criminalization" will again be labeled as "moral imperialism" and will be met by considerable opposition from other nations. Cloning a treaty after the FCPA is not the answer to this problem. The proposed multilateral agreement has the potential of both controlling overseas accommodation payments and receiving the international community's acceptance. New organizations and a new world order makes the timing right for this proposed draft to be submitted to world leaders. As a result, this operational, effective, and ratifiable agreement could be the first real multinational deterrent to foreign corruption.

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121. Convention on the Settlement of Investment Disputes Between State and Nationals of Other States, 17 U.S.T. 1270, *reprinted in* 4 I.L.M. 532 (1965) Convention Establishing the Multilateral Investment Guarantee Agency, done at Seoul S. Korea, Oct. 11, 1985, *reprinted in* 24 I.L.M. 1598 (1985).

122. RUBIN & HUFBAUER, *supra* note 6, at 42; OECD *Guidelines for Multinational Enterprises, Report by the Secretary-General*, Annex 4 at 99 (1977) *reprinted in* 15 I.L.M. 969 (1976) note item #2.

123. LANGE & BORN, *supra* note 84, at 52.



# PROPOSED TREATY ON THE PREVENTION OF INTERNATIONAL CORRUPT PAYMENTS

WHEREAS international commercial transactions have become more common and increasingly facilitated by corrupt payments to public officials;

WHEREAS such corrupt payments are socially undesirable;

WHEREAS acceptance of these corrupt payments erode the public's confidence in their state's leadership;

WHEREAS several governments have become politically unstable due to the exposure of these ongoing corrupt payments;

WHEREAS such corrupt payments increasingly cause international incidents and strain relations between nations;

WHEREAS such corrupt payments are detrimental to a nation's ability to secure goods and services at an economically efficient and fair price;

WHEREAS such corrupt payments deprive legitimate entities from securing international commercial contracts;

WHEREAS such corrupt payments originate from transnational corporations and can only be eliminated through multinational cooperation;

WE ARE RESOLVED to condemn and eliminate all corrupt practices of bribery of a public official by transnational corporations, their intermediaries, and others involved in violation of the laws and regulations of Host Countries.

## ARTICLE I

For the purpose of this Agreement:

- (a) "Commission" means the Corrupt Practices Commission created by Article IX.
- (b) "Committee" means the Corrupt Practices Committee created by Article VII.
- (c) "Corrupt Payment" shall be defined by the host state's internal laws concerning illegal payments, bribes, or gratuities to governmental entities at the time of the alleged act taken in account all host state rulings, codes, regulations, cases, or written opinions construing or creating these internal laws.
- (d) "Host State" means the sovereign territory in which the alleged recipient or benefactor of a corrupt payment holds a "public official" position.

- (e) “Home State” means the sovereign territory in which the Offended Private Party is incorporated or, if the Offended Private Party is a natural person, means his or her domiciliary State.
- (f) “Illegal” shall be defined by the Host State’s internal criminal or penal laws concerning illicit payments to public officials taken in account with all Host State rulings, codes, regulations, cases, or written opinions construing or creating these internal laws.
- (g) “Intermediary” means any enterprise or any other person, whether juridical or natural, who negotiates with or otherwise deals with a public official on behalf of any other enterprise or any other person, whether juridical or natural, in connection with an international commercial transaction;
- (h) “International commercial transaction” means any sale, contract, or any other business transaction, actual or proposed, with a national, regional, local government, any authority or agency referred to in paragraph (l) of this article. International commercial transaction also refers to any business transaction involving an application for governmental approval of a sale, contract, or any other business transaction, actual or proposed, relating to the supply or purchase of goods, services, capital, or technology emanating, wholly or substantially, from a State or States other than the one in which those goods, services, capital, or technology are to be delivered or rendered. It also means any application for or acquisition of proprietary interest or production rights from a government by a foreign national or enterprise;
- (i) “Knowingly” (with respect to conduct) means being aware that such a person, intermediary, agent, subsidiary, or any entity is engaging in conduct in violation of this Agreement or that such circumstances exist that should reasonably place a party on notice that a result is substantially certain to occur, or has occurred, from conduct in violation of this Agreement.
- (j) “Offended Private Party” means aggrieved private person or legal corporate entity which, through loss of a possible contract, is damaged by a corrupt payment. The Offended Private Party must have been a legitimate business competitor to the Suspect Private Party and in direct competition with the Suspect Private Party in securing a contract involving an international commercial transaction.
- (k) “Payment” means the delivery of any item or intangible of value.
- (l) “Public official” means any person, whether appointed or elected, whether permanently or temporary:

- (i) Who, at the national, regional or local level holds a legislative, administrative, judicial or military office or who holds such an office in an international intergovernmental organization; or
  - (ii) Who, in performing a public function is an employee of an international intergovernmental organization or of a government or of a public or governmental authority or agency or who otherwise performs a public function;
- (m) “Suspect Private Party” means any person or legal corporate entity which is suspected of violating this Agreement by knowingly making, offering, or allowing another on their behalf to make or offer a corrupt payment. A Suspect Private Party does not necessarily have to be a domiciliary of a signatory country.

## ARTICLE II

It is a violation of this Agreement to knowingly offer, promise, or give, directly or indirectly, or through an intermediary, any corrupt payment to:

- (a) a public official or intermediary for the purposes of influencing any act or decision of such public official in his official capacity, or induce such public official to do, or omit to do, any illegal act in violation of the lawful duty of such public official; or
- (b) a public official or intermediary in an attempt to induce a public official to influence a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or
- (c) any political party or official thereof or any candidate for political office for the purpose of influencing any act or decision of such party, official, or candidate in their official capacity, or induce such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate in connection with an international commercial transaction.

## ARTICLE III

It shall be an affirmative defense to actions under this Agreement that:

- (a) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the

foreign official's or candidate's political party, party official, or country; or

- (b) the payment, gift, offer, or promise of anything of value, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, public official, or candidate and was directly related to:
  - (i) the promotion, demonstration, or explanation of products or services; or
  - (ii) the execution or performance of a contract with a foreign government or agency thereof; or
- (c) the payment, gift, offer, or promise of anything of value was to facilitate or expedite payment to a public official, political party, or party official, and the purpose of which is to expedite or to secure the performance of a routine governmental action by the public official, political party, or party official, and such payment is not in violation of Host State's internal laws; or
- (d) the Suspected Private Party was acting in good faith or in accordance with an advisory opinion rendered pursuant to Article VIII of this Agreement.

#### ARTICLE IV

Each signatory country shall ensure that enterprises or other juridical persons established in its territory maintain, under penalty of law, accurate records of payments made by them to an intermediary, or received by them as an intermediary, in connection with an international commercial transaction. Each signatory country agrees to consider for adoption all accounting procedures promulgated by the Committee. All transnational payments over \$10,000.00 to public officials or political parties should be disclosed to the Committee on an annual basis.

#### ARTICLE V

Each signatory country shall require, under penalty of law, that enterprises or other juridical persons established in its territory include the following clause in all transnational commercial transaction contracts:

"One or more of the parties to this transnational commercial transaction is bound by the Treaty on the Prevention of International Corrupt Payments. Both parties are aware of the existence and details of said treaty. A contracting party, of this contract, from a signatory country verifies that no corrupt payments were offered or delivered in violation of



this treaty. Any contracting party, of this contract, from a signatory country must keep accurate accounting records pursuant to Article IV of said treaty and is encouraged to solicit advisory opinions on questionable transactions pursuant to Article VIII of said treaty."

#### ARTICLE VI

Each signatory country should refrain from permitting tax deductions on expenditures that are determined to be "corrupt payments."

#### ARTICLE VII

- (a) This Agreement establishes the Corrupt Practices Committee composed of fifteen (15) representatives from signatory countries who will be known as Counselors. The Counselors shall meet routinely and:
  - (i) promulgate accounting rules that are intended to prevent and disclose corrupt payments in international commercial transactions; and
  - (ii) render advisory opinions pursuant to Article VIII of this Agreement; and
  - (iii) arbitrate all disputes between signatory countries concerning the interpretation of and enforcement of this Agreement; and
  - (iv) formulate and amend the procedural rules of the Corrupt Practices Commission.
- (b) The Counselors shall be elected by signatory countries every three (3) years serving staggered terms of three years. The candidates for this committee shall possess excellent credentials. Each signatory country is limited to having only one (1) national on this regulatory board at any given time.
- (c) The Committee shall formulate rules of procedure concerning its responsibilities.
- (d) All Committee Counselors shall be neutral, impartial decision makers and be of the highest moral character.
- (e) The Committee shall work closely with all nations and regional organizations to combat corrupt payments in international commercial transactions.
- (f) The Committee shall create, coordinate and administer all necessary support staff and committees as it deems necessary to carry out its obligations under this treaty.

- (g) The Committee shall hear petitions to recuse a member of the Corrupt Practices Commission, and replace a commissioner if necessary.

### ARTICLE VIII

All signatory countries persons, companies, or corporate entities may request an advisory opinion concerning a questionable situation that may, or may not, be a corrupt payment. Hypothetical situations will not be considered by the Committee. All requests must be filed by possible offending private parties or signatory governments and be supported by all the facts sufficient for the Committee to render a reliable advisory opinion. Upon receiving a valid advisory opinion request the Committee shall:

- (a) Immediately analyze the provided facts; request more information from the filing party if necessary; and render an opinion within fourteen (14) days; and
- (b) Not disclose the identities of any of the parties involved or the facts surrounding the advisory opinion unless an Offended Private Party raises the affirmative defense of relying on an advisory opinion pursuant to this section and in defense of corruption complaint filed pursuant to Article X of this Agreement.

### ARTICLE IX

- (a) This Agreement establishes the Corrupt Practices Commission composed of seven (7) Commissioners from signatory countries elected by signatory countries, with individual tenure of five years, serving in staggered terms. All Commissioners should be neutral, impartial decision makers possessing the highest moral character. No two Commissioners shall be from the same signatory country. The Commission shall have the power to:

- (i) hear all complaints filed pursuant to Article X of this Agreement; and
- (ii) to discover all documents, depose witnesses, and audit accounting records kept pursuant to Article IV of this agreement; and
- (iii) interpret Host Country laws on corrupt payments; and
- (iv) certify a cause in which it believes a corrupt payment has taken place in violation of this treaty; and
- (v) award attorney's fees and costs to a prevailing party; and

- (vi) request a bond be posted by an alleged Offended Private Party to assure that an innocent Suspect Private Party can recover reasonable attorney's fees and costs.
- (b) A Suspect Private Party can demand the replacement of one of the Commissioners which will be replaced with a Commissioner from the Suspect Private Party's domiciliary State if:
  - (i) There are presently no Commissioners sharing the same nationality of the Suspect Private Party; and
  - (ii) The Suspect Private Party is from a signatory country.

#### ARTICLE X

An Offended Private Party of a signatory country has the right to file a complaint with the Commission alleging a corrupt payment was made or offered in an international commercial transaction. Both the Offended Private Party and Suspect Private Party have the right to notice, opportunity to be heard, and ability to produce evidence on their behalf. A complaint must be filed within 180 days of the alleged corrupt payment and be based on good faith. If the Commission finds that a complaint was not filed in good faith, then the Suspect Private Party may be awarded attorney's fees and costs to be paid by the complaining Offended Private Party.

#### ARTICLE XI

- (a) The Commission's complaint procedure shall consist of:
  - (i) Notifying all parties concerned in the complaint; and
  - (ii) Confidential investigation of the entire circumstances surrounding the alleged corrupt payment; and
  - (iii) Collecting evidence through subpoenas and depositions to render a fair decision;
- (b) The Commission must establish, by competent evidence, that more likely than not, a corrupt payment occurred.
- (c) A presumption of a corrupt payment arises if the Suspect Private Party refuses to honor a Commission's discovery request or refuses to take part in these proceedings.
- (d) If the Commission finds that:

- (i) a corrupt payment has not occurred, the proceedings shall be closed and all documents shall be sealed. The alleged Offended Private Party may be ordered to pay reasonable attorney's fees and costs incurred by the Suspect Private Party.
- (ii) a corrupt payment has occurred, the cause will be "Certified" and all records and documents will be turned over to the both the Offended Private Party and the Suspect Private Party.

## ARTICLE XII

Upon certification of a cause:

- (a) The Commission shall release a public statement that describes its findings and conclusions.
- (b) Signatory countries shall bar the Suspect Private Party from doing business within its territory for a period of Ten (10) years; and
- (c) The Offended Private Party has the right to sue, under a contract interference tort theory, if one is available in his/its Home State and if that Home State is a signatory to this Agreement.
- (d) All signatory countries agree to recognize and enforce foreign judgments of fellow signatory countries in civil/private causes of action described in subsection (c) of this Article. This section shall not be interpreted in denying a signatory country the right to refuse enforcement of foreign judgments if such refusal is consistent with local laws, standing treaties and/or international legal principles.

## ARTICLE XIII

Signatory countries are encouraged to pass local legislation criminalizing corrupt payments in international commercial transactions. However in no way is this Agreement to be interpreted to:

- (a) require a signatory country to adopt criminal legislation concerning international commercial transactions; or
- (b) exclude any criminal jurisdiction exercised in accordance with the national law of a signatory country.

## ARTICLE XIV

Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.

## ARTICLE XV

- (a) Contracting States shall afford one another, the Committee and Commission the greatest possible measure of assistance in connection with investigations and proceedings brought pursuant to this Agreement, as far as permitted under their national laws, and all Contracting States shall provide assistance in the general operation of this treaty.
- (b) Contracting States shall, upon mutual agreement, enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of mutual assistance in accordance with this article.
- (c) The provisions of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in legal matters.

## ARTICLE XVI

This Agreement shall enter into force thirty (30) days after the date of deposit of the Twenty-second (22nd) instrument of ratification, acceptance, approval or accession. The instruments of ratification shall be deposited with the Secretary General of the United Nations.